The Ithaca Journal-News, Inc. *and* Ithaca Typographical Union No. 379.[1] Case 3-CA-9692

November 27, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 27, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by telling two employees on separate occasions that they would receive wage increases if the Union were decertified. Contrary to the Administrative Law Judge, however, we conclude that Respondent did not violate Section 8(a)(3) and (1) when, during collective-bargaining negotiations with the Union, (1) it discontinued merit increases for unit employees, and (2) it did not grant them the same increases in their automobile mileage allowance that it granted to employees in its advertising department.[3]

On June 1, 1979, the Union filed a petition to represent Respondent's newsroom employees. On the same date, it sent Respondent a letter stating in pertinent part that any attempt by Respondent "to change the status quo with regard to past practices of wages, hours and working conditions during the period of our organizing efforts and subsequent contract negotiations is in violation of Section 7 and 8 of the National Labor Relations Act. . . ." Respondent replied, in a letter dated June 7, 1979, that its understanding of the Union's statement was as follows:

> No further wage, benefits or working condition changes can be made in the newsroom while you are trying to convince newsroom employees to join the Typographical Union unless these changes were announced prior to receipt of your letter.
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> * * * * *
>
> However, if, after learning all the facts, they decide to be represented by your Union, I believe you are also correct in stating that wages, benefits and working conditions cannot be changed until an agreement is reached.

The election was held on August 8, 1979, and the Union was subsequently certified as the exclusive representative of the newsroom employees. Negotiations for a collective-bargaining contract began August 1979 and continued until September 1980, culminating in tentative agreement, which had not been ratified as of the date of the hearing, October 27, 1980. Merit increases, which were not retroactive, were granted to newsroom employees in September 1980 pursuant to this agreement.

During negotiations, on November 15, 1979, the Union sent Respondent a letter saying it had no objections to Respondent's effecting "scheduled pay increases" in the bargaining unit. Respondent replied in a subsequent letter that it did not know what the Union meant by such term, inasmuch as salaries and other terms and conditions of employment were then being negotiated. The Union responded on December 19 that its position was based upon "past practice," and it listed 16 employees who it believed were entitled to pay increases. Finally, on January 9, 1980, Respondent sent a letter telling the Union that salary increases for unit employees had been given on a "discretionary basis" and, like all other discretionary terms of employment, were subject to negotiation. This letter further stated that increases for probationary employees, since they were given automatically, were an exception.[4]

The Administrative Law Judge found that Respondent had a longstanding policy of regularly evaluating the performance of newsroom employees and granting them annual wage increases. He relied on the testimony of witnesses as to what they were told when hired and upon payroll records showing the dates and amounts of increases received by each employee, and he concluded that Respondent's discontinuance of this practice was

[1] The name of the Charging Party (herein called the Union) appears as amended at the hearing.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Respondent reimbursed employees who used their own automobiles in connection with their work on a per-mile basis.

[4] The evidence shows that, almost without exception, Respondent has given probationary employees wage increases after they have successfully completed approximately 6 months of work. Respondent continued this practice during negotiations, and these actions are not at issue.

discriminatory. Prior to the appointment of Al Greene as managing editor in mid-1978, Respondent apparently had a fairly regular practice of granting merit increases to employees in January and June or July of the year. Greene, however, modified this practice.[5] According to employee John Maines, Greene told him when he was hired that he would receive a raise at the end of a 6-month probationary period and would be considered for a raise annually thereafter. However, Carol Eisenberg testified that Greene told her she would be reviewed 6 months after receiving her probationary raise. The testimony of these witnesses is thus conflicting and does not, in itself, clearly establish a policy of regular merit increases.[6]

The practice under Greene has been even less regular and definite than these statements would indicate. In 1978, including the 5-month period before Greene became managing editor, of 13 employees who ostensibly would be entitled to nonprobationary raises, 10 received 1 increase and 3 received no increases. In 1979, of 18 employees ostensibly eligible for nonprobationary raises, 2 employees received 2 increases, 9 received 1 increase, and 7 employees got no increase.[7] While most of these increases in 1978 and 1979 were given in June, in both years a significant proportion of them was granted randomly in other months. The amounts of wage increases also did not follow any discernible pattern. Based on a weekly salary, increases ranged from $10 to $20 and were apparently unrelated to increases received either at the time by comparably paid employees or in the past by the particular employee.

Both before and during Greene's tenure, Respondent did not conduct any formal or written evaluations of newsroom employees. It did not systematically review the performance of newsroom employees and grant raises to those who met a minimum standard, nor did it rate them according to any criteria. Rather, as Greene expressed it, when an employee "sparkled," he or she got a merit raise. Employees who were chosen for merit increases were so informed in brief, oral reviews or received the increases in their paychecks without any discussion. Employees who did not receive increases were excluded not because they had failed a review with objectve, articulable standards or, indeed, because they had failed any review whatsoever; they simply had not achieved the entirely subjective standards of Greene or his predecessor. The arbitrary manner in which Respondent dispensed merit increases is further shown by a memorandum to Greene written by newsroom employees, just before the petition was filed, expressing their frustration at the lack of regular merit increases.

The circumstances herein are considerably different from those in *General Motors Acceptance Corporation*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973), and other cases where the Board has found a violation in an employer's unilateral discontinuance of a merit increase program.[8] In *General Motors Acceptance Corporation*, the employer instituted a wage freeze of its own accord when the union filed the petition therein, but it continued giving employees semiannual merit reviews, in May and November. Prior to the wage freeze, employees who were rated "fair" or higher in the merit reviews received raises, which were effected at different times during the year. In the 9 months of the calendar year before the freeze, nearly all of the eligible employees had received merit increases in approximately the same amount.

Whereas the employer in *General Motors Acceptance Corporation* exercised discretion only with respect to certain aspects of its merit increase program, Respondent's granting of increases has been entirely discretionary. The timing and the amounts of raises, and the selection of employees to receive them, have not been determined in any objective or consistent manner. Respondent did not regularly evaluate employees irrespective of whether they were to receive increases and thus did not continue periodically to review employees after the filing of the petition without granting them increases. Thus, it is impossible to conclude with any degree of certainty when, and if, merit increases would have been given and which employees would have received them. See *The Great Atlantic & Pacific Tea Company, Inc.*, 192 NLRB 645 (1971). Requiring Respondent during negotiations to continue giving raises to employees selected by it, at times and in amounts unrestricted by a clearly established pattern, is tantamount to licensing it to grant them

[5] Respondent did not, at all material times herein, provide any other type of wage increases, such as cost-of-living raises.

[6] When advised by the Administrative Law Judge that her evidence on this point was becoming cumulative, counsel for the General Counsel made an offer of proof as to the testimony of other witnesses concerning statements to them when they were hired. Assuming that the General Counsel's representation of their testimony is correct, however, we note that their testimony would show the same disparity between being reviewed at 6-month or at 1-year intervals.

[7] Prior to the merit increases given in September 1980 pursuant to the parties' tentative agreement, the last such increases were given in June 1979. The decision to grant these increases was made before the petition was filed on June 1, 1979.

[8] E.g., *Allied Products Corporation, Richard Brothers Division*, 218 NLRB 1246 (1975), enfd. in pertinent part 548 F.2d 644 (6th Cir. 1977); compare *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973), with *Southeastern Michigan Gas Company*, 198 NLRB 1221 (1972), enfd. 485 F.2d 1239 (6th Cir. 1973). See, generally, *Charles Manufacturing Company*, 245 NLRB 39 (1979).

unilateral wage increases, contrary to *N.L.R.B.* v. *Benne Katz, etc. d/b/a Williamsburg Steel Products, Co.*, 369 U.S. 736 (1962). In sum, the evidence fails to establish that Respondent had a merit increase program that it was bound to continue during negotiations.

Furthermore, because Respondent's discontinuance of merit increases was alleged and litigated as discriminatory conduct in violation of Section 8(a)(3), rather than as a unilateral change in violation of Section 8(a)(5), the General Counsel also had to show that Respondent was motivated by animus toward employees' selection of the Union. The Administrative Law Judge found that such unlawful motivation was evidenced by (1) the aforementioned two statements violating Section 8(a)(1), made by Greene in the spring of 1980, promising employees wage increases if they decertified the Union; and (2) evidence that some employees hired during the period when merit raises were not being given, after receiving their probationary increases, were paid more than senior employees. Contrary to the Administrative Law Judge's implication in footnote 9 of his Decision, the record does not show that all new hires, after receiving their probationary increases, were paid more than all senior employees. Moreover, there is no evidence whether the few senior employees who were paid less than some of the new hires had comparable skills, experience, and duties. Thus, the mere fact that some new employees received more pay than some senior employees is inconclusive to establish antiunion motivation. The two statements found to violate Section 8(a)(1) are insufficient to show such animus in light of Respondent's position, manifested in the exchange of correspondence initiated by the Union, that it was precluded by law from granting merit increases because of its collective-bargaining obligations.

Therefore, we conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act by discontinuing merit increases for newsroom employees during negotiations with the Union.

We also disagree with the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(3) and (1), while it was engaged in collective bargaining, by not granting newsroom employees the same increases in their mileage allowance for use of their personal automobiles that it granted to employees in its advertising department. The only evidence that Respondent had such a practice was a memorandum from Respondent's publisher dated May 30, 1979, stating that the circulation department would receive a certain rate and "[a]ll other departments will go from 13-1/2 cents per mile to 14-1/2 cents per mile." Testimony established that "all other departments" referred to the newsroom and the advertising department. The record does not reveal the practice, if any, before this date. The advertising department subsequently received two more increases, which were not given to the newsroom: From 14-1/2 cents to 15-1/2 cents per mile on an unspecified date, and from 15-1/2 cents to 16-1/2 cents per mile on January 22, 1980. In February 1980, a newsroom employee asked Respondent's publisher why the newsroom had not received the increase that was recently granted to the advertising department; the publisher replied that the mileage allowance was a subject of collective-bargaining negotiations and could not be changed then. Apparently pursuant to the tentative agreement between Respondent and the Union, the rate for newsroom employees was increased to 16-1/2 cents per mile shortly before the hearing.

Contrary to the Administrative Law Judge, we do not think one ambiguous memorandum proves that Respondent had an "established past practice" of granting the newsroom the same mileage allowance it granted to the advertising department. See *United Technologies Corporation (formerly United Aircraft Corporation)*, 226 NLRB 750 (1976). Even if this document were sufficient to show such a practice, the evidence fails to prove that Respondent's motivation in discontinuing it was discriminatory. The above statement by Respondent's publisher does not indicate animus toward the employees' selection of the Union, and the two statements by Greene found to violate Section 8(a)(1) bear upon the unrelated issue of merit increases. Accordingly, we shall also dismiss this allegation of the complaint.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, The Ithaca Journal-News, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Ithaca Typographical Union No. 379 is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising employees Judith Horstman and Carol Eisenberg that they would receive wage increases if the Union were decertified, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate Section 8(a)(3) and (1) of the Act by discontinuing merit increases for newsroom employees while it was engaged in collective-bargaining negotiations with the Union.

6. Respondent did not violate Section 8(a)(3) and (1) of the Act by not granting newsroom employ-

ees the same increases in their mileage allowance that it granted to employees of its advertising department while it engaged in collective-bargaining negotiations with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Ithaca Journal-News, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising employees that they would receive wage increases if the Union were decertified.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its office and place of business located in Ithaca, New York, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promise our employees that they will receive wage increases if the Union is decertified.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

THE ITHACA JOURNAL-NEWS, INC.

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This case was heard in Ithaca, New York, on October 27 and 28, 1980. The charge was filed by Ithaca Typographical Union No. 379 (herein the Union) on March 28, 1980. A complaint based on that charge issued on May 7, 1980, alleging that The Ithaca Journal-News, Inc. (herein Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent denied merit increases and refused to raise the mileage allowance for newsroom employees in violation of Section 8(a)(1) and (3) of the Act.

2. Whether Respondent violated Section 8(a)(1) of the Act by promising emoloyees pay raises if they decertified the Union.

3. Whether Respondent's conduct comes within the 6-month limitation rule contained in Section 10(b) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed on behalf of the General Counsel and Respondent. The briefs have been carefully considered.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, The Ithaca Journal-News, Inc., is a newspaper of general circulation published daily in Ithaca, New York. Respondent, in the course and conduct of its business operations, purchases, transfers, and delivers to its Ithaca, New York, plant goods and materials valued in excess of $50,000, which are transported to said location directly from States of the United States other than the State of New York. During the past 12 months Respondent has received gross revenues in excess of $200,000, has subscribed to two interstate news services, and has published advertisements for nationally marketed products.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Ithaca Typographical Union No. 379 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On June 1, 1979, the Union filed a petition to represent newsroom employees of Respondent. The election was held on August 8, 1979, and the Union was subsequently certified. Negotiations for a collective-bargaining contract began in August 1979 and continued until September 1980, when a tentative agreement was reached between the bargaining committee of the Union and the bargaining committee of Respondent.[1]

On June 7, 1979, Respondent instituted a policy of not granting any wage increases (with the exception of probationary increases for new emoloyees). That practice continued until the pay and benefit increases had been made pursuant to the signing of a tentative agreement in September 1980, referred to above.

The following letter dated November 15, 1979, was sent by Donald C. Ball, secretary of the Union, to Peter Hickey, publisher of Respondent:

> This letter is to inform you that International Typographical Union No. 379 has no objections to the Ithaca Journal putting into effect scheduled pay increases in the newsroom. It is to be understood that any increases put into effect will not prejudice our contract negotiations in the newsroom.
>
> Because of rate of inflation and also due to the fact that some bargaining unit employees are overdue on their raises, we would hope that you comply with this request.

B. *Respondent's Past Practice*

Respondent contends that its past practice was as follows:

When Al Greene[2] took over from his predecessor he did not become aware of any written or verbal policy concerning pay increases. He established a policy of granting an increase if the individual successfully completed a 6-month probation period after hire and, after the employee passed that threshold, the policy was to give employees discretionary increases based on their performance. Respondent also contends that Greene had no particular system for giving raises; that if the reporter felt he was doing a good job he would ask for a raise or if Greene felt the reporter was doing a good job he would initiate a request for a raise for that employee. Employee requests were not always granted.

The General Counsel, on the other hand, contends that, prior to June 1979, Respondent had a clearly established past practice of granting periodic merit increases for newsroom employees. The pattern appears to have varied from time to time but generally those increases were granted on yearly bases or at 6-month intervals.

Four newsroom employees testified, Judith Horstman, John Maines, Carol Eisenberg, and Jane Marcham, concerning what they were told at the time they were initially hired and with respect to their actual history of increases while employed by Respondent. Their testimony reveals that there was indeed a pattern, albeit a varied one. The payroll records in evidence reveal that, after the 6-month probationary increase, employees received pay raises practically every year. In some cases employees received two pay raises in 1 year followed by no pay raises the following year and then a resumption of pay raises on a fairly scheduled annual basis, although many of the increases did not fall exactly on anniversary dates.

Employee Eisenberg testified that, when she was employed by Greene in mid-June 1979, Greene told her she would be on probation for 6 months and if she did an acceptable job during that time she would get a raise at the end of that period, would be reviewed 6 months thereafter, and would receive subsequent raises if she continued doing a competent job. Eisenberg said she received increases 6 months and 12 months after she was initially hired. Six months after her second increase (December 1979 or January 1980) she asked Greene for a raise inasmuch as she thought she was doing a good job. Greene responded that he thought she was doing a good job and would like to give her a raise but could not "because the labor negotiations are under way."[3] She said that, after that, Greene gave her the same answer when she asked for a raise on other occasions.

Maines testified that, when he was hired by Greene in February 1979, Greene told him he could expect a raise at the end of the 6-month probationary period and, if he made it through the period, he would be considered for a raise at the end of his first year and every year after that. Maines said he received an increase in June 1979, which Greene told him was based on merit but that when he asked Greene about a raise after he had worked for a year (February 8, 1980) Greene told him he had done good work; that Greene was not unhappy at all with his work; that he would love to give him a raise; but he could not because his hands were tied by the union matter.[4]

Employee Judith Horstman testified that she asked for a raise near the end of 1979, and Greene responded that while contract negotiations were in progress he could not grant an increase because his hands were tied. It was during this time that the Union stated it would not have any objection if Respondent granted wage increases on behalf of bargaining unit members as it had done in the past.

C. *The Alleged Promise of Pay Raises if the Employees Would Decertify the Union*

Judith Horstman further testified that, in late February or early March 1980, she again asked Greene for a raise.

[1] As of the date of the hearing in this case, the agreement had not yet been ratified and signed. Pay and benefit increases pursuant to that tentative agreement, however, had been effected.

[2] The name "Al Greene" is spelled "Al Green" in Respondent's brief. But the record establishes that the correct spelling is Al Greene.

[3] Referring to the collective-bargaining negotiations that were under way at the time.

[4] Greene did not deny the substance of these conversations with Eisenberg and Maines.

Horstman said that Greene responded stating that she deserved a raise but his hands were tied while they were negotiating. Horstman further testified that, when she again asked for a raise, Greene said, "[I]f you want a raise decertify the Union and then you'll get your raise."[5]

Eisenberg further testified that Greene took her out to lunch sometime in early April 1980. She told him that staff members were unhappy about not getting increases and that Greene replied that he was aware of it and that he was sorry about it, but that there was nothing he could do. According to Eisenberg, Greene further stated that he had warned all of them before they voted that once a union came in it would not be Al Greene negotiating with Carol Eisenberg, but the Ithaca Typographical Union representative talking to a Gannett representative from Rochester. Greene then said, "Don't you realize money is in the budget if you decertify." Eisenberg testified further that Greene told her she should find out what it meant to come to impasse.

Greene testified concerning the conversations with Horstman and Eisenberg on the topic of decertification. Greene's memory was bad with regard to the conversation with Horstman, testifying that he did not recall who initiated the conversation and that he could not remember any specific conversation. He also said he could not recall how the topic of decertification came up. He said he had a standard answer when people started talking about decertification and he recited that standard answer. He said his standard answer was, "It was up to the newsroom." Greene testified that he did recall a conversation with Eisenberg in which she said it was clear, from the Company's attitude, that they wanted the newsroom to decertify. He told her that it was up to the newsroom and said that there was no other discussion.

Greene said he remembered the conversation with Eisenberg in which they talked about the Union and what was happening in the Union and about raises for the people. He said Eisenberg wanted to know if there were room in the budget for raises and he said there was. Greene admitted stating, "I said my hands were tied and I couldn't do anything." Greene further testified that Eisenberg then said it was clear the Company wanted the newsroom to decertify but Greene denied saying that if they would decertify that they would be able to get their raises.[6]

[5] Horstman stated that she did not bring up the decertification and that Greene did.

[6] With respect to the testimony of the conversations between Greene and the employees discussed above, I credit the employees' version and not Greene's. As stated above, Greene's memory was poor on specifics. He spoke hesitantly and, on occasion, upon further questioning he either revealed more or gave a different version. Each employee testified in a clear and convincing manner, unhesitantly and consistently. Moreover, Greene testified that he had no regular system to evaluate employees, but rather, when somebody's work was really "sparkling," he decided to give him or her an increase. In the latter regard, Greene's testimony is contradicted both by the payroll sheets of newer employees and the testimony of Maines and Eisenberg concerning statements made by Greene at the time they were hired. Greene said that 5 out of the 27 employees "sparkled" in June 1979, and therefore received merit increases. The payroll sheets reveal that nine employees must have "sparkled" inasmuch as nine employees were granted increases in early June 1979.

D. *Mileage Reimbursement*

The employees of Respondent who use their own automobiles in connection with their work were reimbursed a mileage rate which was increased on occasion. Such increases were published by Respondent by placing a notice on the employee bulletin board.

Employee John Huenneke testified that in February 1980, upon learning that the advertising department had been given an increase in the mileage rate, but not the newsroom employees, he told Terry Hopkins, publisher, that the newsroom employees were being treated discriminatorily. Hopkins responded that the Company did not want to break the law; that the Company and the Union were involved in contract negotiations; that she felt mileage reimbursement was a subject for bargaining; and that the Company could not change the rate for the newsroom employees at that time.[7] Huenneke's testimony was not controverted. I credit it.

E. *Discussion and Conclusions*

That Respondent's decision to freeze wages of the newsroom employees was made prior to the 10(b) period is not in issue. The fact that Respondent refused to grant merit increases to the newsroom employees from that date (except increases granted in September 1980 pursuant to the tentative agreement) because of union negotiations is not in issue. That the Union in November 1979 notified Respondent that it had no objection to its granting pay increases to employees in the unit according to past practice is also not in issue.

Contrary to the contention of Respondent, the record substantiates a past practice of granting increases to employees in the newsroom annually, although not necessarily on anniversary dates (the testimony of the witnesses and the payroll sheets received in evidence). Accordingly, I do not agree with Respondent that it was in a "damned if you do, damned if you don't" situation with respect to granting merit increases during negotiations.[8] As in *General Motors Acceptance Corporation*, 196 NLRB 137 (1972), enfd. 476 F.2d 850 (1st Cir. 1973), Respondent had a longstanding policy of evaluating employee performance and rewarding such performance with wage increases. Such a practice was an existing form of compensation, and a term and condition of employment regularly expected by the employees. And even though an element of discretion predicated upon prior merit review was exercised by Respondent with respect to the unit employees after Al Greene became in charge, it did not make it any less a past policy of Respondent. Accordingly, Respondent could have continued its past policy, especially in view of the acquiescence of the Union, and not have violated the law. Instead, because of the negotiations with the Union, Respondent

[7] The mileage rate for advertising and newsroom departments was increased from 13-1/2 cents to 14-1/2 cents per mile on May 30, 1979. On January 22, 1980, the mileage rate for the advertising department was increased from 15-1/2 cents per mile to 16-1/2 cents. Thus, the advertising department received two mileage rate increases after May 30, 1979, which were not received by the newsroom department.

[8] The Union's request in November that Respondent grant those increases should have relieved Respondent's doubts of legality.

suspended merit increases which it would otherwise have given to its employees.[9]

In this case Respondent's conduct included a statement by Managing Editor Greene to at least two employees which, at best, inferred that the employees would receive increases if they decertified the Union inasmuch as there was money for such increase in the budget. By its conduct, Respondent, in effect, placed full responsibility on the Union for the employees' failure to receive their merit increases. The message conveyed to the employees was clear—to obtain their scheduled merit increases they first had to abandon the Union. *General Motors Acceptance Corporation, supra.*

I consider Respondent's conduct as being equivalent to Respondent's conduct in *General Motors Acceptance Corporation, supra*, wherein the Board stated, "The evil of the Respondent's actions was further compounded by the Respondent's coercive poll by which it sought to present evidence of employee dissatisfaction with the Union."

I conclude that Respondent's attempts to decertify the Union, by withholding merit increases and stating that they would receive them if they decertified, interfered with, restrained, and coerced employees in the free exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

I find, further, Respondent discriminatorily discontinued the practice of periodic merit increases and denied employees increases during the 10(b) period,[10] which increases would have been granted to these employees absent the Union, because the newsroom employees selected the Union as their collective-bargaining representative, thereby discouraging union membership by placing the blame for the discontinued merit increases on the Union, in violation of Section 8(a)(3) and (1) of the Act. I find also that by refusing to grant an increase in the mileage reimbursement rate for newsroom employees, while granting such an increase to advertising department employees even though there is an established past practice of giving such increases, Respondent violated Section 8(a)(3) and (1) of the Act.

I also find that the statements made by Al Greene to the effect that, if the employees decertified the Union they would receive raises, constitute interference, restraint, and coercion of employees in the free exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, by discriminatorily denying merit increases to newsroom employees and by discriminatorily refusing to raise the mileage allowance for newsroom employees because the newsroom employees selected the Union as their collective-bargaining representative, thereby discouraging membership in the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent committed certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies and purposes of the Act. I shall recommend that, in addition to posting a notice to employees, Respondent make whole those newsroom employees for any loss of wages and benefits they may have suffered because of Respondent's discriminatory failure to grant merit increases and mileage rate increases after September 28, 1979.[11] Such merit increases and mileage rate increases shall be paid as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

[9] The testimony of witnesses indicated that Greene would have given several of the unit employees merit increases but for the negotiations that were then being conducted. In addition, there is uncontroverted evidence that Respondent paid new hires more after the 6-month increase than it did to unit employees, thus, in effect, penalizing the more senior employees for having voted for the Union.

[10] Each individual denial of a merit increase during the 10(b) period constitutes a violation of the Act although the initial decision with respect to the policy of denials was made and disclosed prior to the 10(b) period. *Pease Company*, 251 NLRB 540 (1980); *General Motors Acceptance Corporation, supra.*

[11] All conduct prior to that date comes within the proscription of Sec. 10(b) of the Act.